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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. ~~1411~~ 180

PAUL C. EDWARDS and EDWARDS ENTERPRISES, INC., *Petitioners,*

v.

THE UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Tenth Circuit entered in the consolidated appeals of petitioners on December 5, 1966.

Citations to Opinions Below

The United States District Court for the Northern District of Oklahoma did not render an opinion. The opinion of the Court of Appeals, which is attached hereto as Appendix A, is not yet officially reported.

Jurisdiction

The judgments of the Court of Appeals were entered on December 5, 1966. See Appendix B, *infra* p. 23. A petition for rehearing was denied on April 20, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Question Presented

Where, in violation of the Court Reporters' Act, 28 U.S.C. 753, a substantial portion of a criminal trial proceeding is not recorded by the reporter, should the conviction be reversed whether or not defendants' appellate counsel are able to assert that prejudicial error occurred during an unreported portion of the trial?

Statute Involved

The statute and rule involved are as follows:

Subsection (b) of the Court Reporters Act, 58 Stat. 5, 28 U.S.C. 753(b), provides in pertinent part:

> "(b) One of the reporters appointed for each such court shall attend at each session of the court and at every other proceeding designated by rule or order of court or by one of the judges, and shall record verbatim by shorthand or by mechanical means which may be augmented by electronic sound recording subject to regulations promulgated by the Judicial Conference: (1) all proceedings in criminal cases had in open court; (2) all proceedings in other cases had in open court unless the parties with the approval of the judge shall agree specifically to the contrary; and (3) such other proceedings as a judge of the court may direct or as may be required by rule or order of court or as may be requested by any party to the proceeding. . . ."

Rule 52 of the Federal Rules of Criminal Procedure provides as follows:

> "(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
>
> "(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

Statement

After a lengthy trial, petitioners were convicted upon an indictment charging violations of various of the federal statutes aimed at regulating the sale of securities and at preventing the use of the means and channels of interstate commerce for fraudulent purposes.[1] The indictments arose from the sale to persons outside Oklahoma of interests in an oil and gas lease respecting property located in Oklahoma. The individual petitioner was sentenced to four years in prison and the corporate petitioner was fined $1,000.00.

During the trial, as the Court of Appeals stated, "Numerous side-bar conferences among court and counsel were not recorded" (App. pp. 17-18 *infra*).[2] In addition, the closing arguments were not recorded (III R. 900). Most of the conferences evidently related to questions of admissibility of evidence. See note 2, *supra*. Although petitioners' trial counsel did not object to the failure of the reporter to

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[1] Specifically, the indictment contained three counts charging violations of the anti-fraud provisions of the Securities Act of 1933, 15 U.S.C. 77q(a); three counts charging mail fraud in violation of 18 U.S.C. 1341; three counts charging the use of interstate commerce to sell a non-registered security in violation of 15 U.S.C. 77e (a)(2); and one count charging transportation in interstate commerce of a security taken by fraud in violation of 18 U.S.C. 2314.

[2] See III R. 654-5, 760, 762, 769, 797, 831, 886; II R. 273, 448, 527, 572, 624.

record the conferences, the reason was, as the Court of Appeals noted and as counsel swore in an affidavit filed with the trial court on a motion for new trial, that they did not know the conferences were not being reported (App. A, p. 19 *infra*; I R. 127-130).[3]

In their affidavit, petitioner's counsel also briefly described one of the "numerous" unrecorded bench conferences. Counsel stated that they advised the trial judge that they were going to elicit from their character witnesses testimony that petitioner Edwards had a reputation in his community "as to being a good, law-abiding citizen, one who is honest, and a man of integrity," but that thereupon "the court limited defense counsel in his further inquiry of the witness and permitted defense counsel only to ask said witness and the remainder of the character witnesses as to Paul C. Edwards' reputation in the Tulsa community as being a law-abiding citizen" (I R. 128-130).

In the Court of Appeals, counsel for petitioners urged, among other things, that this evidentiary ruling that had occurred during the unreported bench conference constituted reversible error, and also that the failure of the court reporter to record the "numerous" bench conferences required reversal. However, counsel did not assert that, apart from the ruling limiting the scope of reputation testimony, any specific error was committed during the unrecorded bench conferences.

As to the trial court's restriction of reputation testimony, the Court of Appeals conceded that "the traits of honesty and integrity were relevant and analogous to the nature of the charge" against petitioner Edwards, but held that

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[3] In their affidavit, trial counsel stated: "The fact that the court reporter had failed to record the consultation above referred to and other consultations at the bench throughout the trial was not known to defendants or their counsel within the time for filing motion for new trial in this case, but came to the attention of counsel after the delivery of the transcript of the record to counsel for defendants on January 22, 1967" (I R. 129).

he had not been prejudiced by the exclusion of this evidence because the trial judge did permit testimony respecting Edwards' "reputation as a good, law-abiding citizen" (App. A p. 19 *infra.*).

As to the failure of the court reporter to record the bench conferences, the Court also ruled that there had been no prejudicial error. The Court acknowledged that the statutory requirement that criminal proceedings be recorded in their entirety, 28 U.S.C. 753(b), is "mandatory," that "[i]t is the responsibility of the [trial] court to be certain that its provisions are strictly observed," that "no request is necessary," and that the "legislative history of the statute makes it clear that the Court Reporters' Act was enacted for the protection of the parties and of the court and to the end that justice may be served by having available an adequate record, and particularly so in a criminal proceeding" (App. A p. 19 n.2, *infra*). However, the Court held that failure to comply with the statute "is not prejudicial error, per se," and that reversal of a conviction should result only where "specific error and prejudice" is claimed to have occurred during an unrecorded portion of the trial and where "the unavailability of a transcript makes it impossible for the appellate court to determine whether or not prejudicial error was committed" (App. A, p. 18 *infra*). Since in the case at bar the only specific claim of error during unreported proceedings related to the limitation on reputation evidence, and since in ruling on that claim the Court of Appeals accepted as true trial counsel's affidavit respecting the unreported bench conference, the Court concluded that the repeated violation of the Court Reporters' Act respecting the "numerous" bench conferences had not constituted prejudicial error.

On April 20, 1967, at the same time that the Court denied petitioners' petition for rehearing, it stayed its mandate for 30 days to permit the filing of a petition for certiorari, and

also provided that the stay would continue in effect until final disposition of the case by this Court.

Reasons for Granting the Writ

In the last six years, there has been a rash of litigation in the Courts of Appeals respecting non-compliance with the statutory requirement that all phases of a criminal proceeding be recorded by a court reporter. 28 U.S.C. 753(b).[4] In the light of this litigation, it seems clear enough that the statute is not being enforced rigorously enough by trial judges, and that it is not at all unusual for the court reporters to fail to transcribe such portions of the trial as voir dire, arguments to the jury and bench conferences. As Judge Biggs put it recently "Failures of court reporters to record various parts of proceedings have been before several courts of appeals with increasing frequency despite judicial admonition that the act is mandatory and must be complied with." *United States* v. *Sigal*, 341 F.2d 837, 849 (3d Cir. 1965) (dissenting in part).

Nonetheless, while the first decision in this line of cases, *Stephens* v. *United States*, 289 F.2d 308 (5th Cir. 1961), appeared, albeit ambiguously, to hold that the failure to record a substantial portion of a criminal trial would constitute reversible error without more, subsequent decisions

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[4] See *Stephens* v. *United States*, 289 F.2d 308 (5th Cir. 1961); *United States* v. *Taylor*, 303 F.2d 165 (4th Cir. 1962); *Fowler* v. *United States*, 310 F.2d 66 (5th Cir. 1962); *Strauss* v. *United States*, 311 F.2d 926 (5th Cir. 1963), *cert. denied*, 373 U.S. 910; *Parrott* v. *United States*, 314 F.2d 46 (10th Cir. 1963); *Brown* v. *United States*, 314 F.2d 293 (9th Cir. 1963); *Addison* v. *United States*, 317 F.2d 808 (5th Cir. 1963), *cert. denied*, 376 U.S. 905; *Burns* v. *United States*, 323 F.2d 269 (5th Cir. 1963), *cert. denied*, 376 U.S. 907; *Washington* v. *United States*, 327 F.2d 793, 795 (5th Cir. 1964); *United States* v. *Bebik*, 333 F.2d 736 (4th Cir. 1964); *Stirone* v. *United States*, 341 F.2d 253 (3d Cir. 1965), *cert. denied*, 381 U.S. 902; *United States* v. *Sigal*, 341 F.2d 837 (3d Cir. 1965), *cert. denied*, 382 U.S. 811; *Dirring* v. *United States*, 353 F.2d 519 (1st Cir. 1965), *cert. denied*, 377 U.S. 1003; *cf. Sica* v. *United States*, 325 F.2d 831, 835, 839-840 (9th Cir. 1963). For a case prior to 1961, see *Stansbury* v. *United States*, 219 F.2d 165, 169 n. 6 (5th Cir. 1955).

in the Third, the Fifth, and now the Tenth, Circuits have established quite a different rule: A violation of the Court Reporters' Act will be regarded as harmless error under Rule 52, Fed. R. Crim. P., unless (1) the appellant asserts that a specific error was committed during the unreported portion of the trial and (2) it is impossible for the court to determine without a transcript either whether the error was committed or whether, if committed, it was substantial. See, *e.g., Strauss* v. *United States,* 311 F.2d 926 (5th Cir. 1963); *United States* v. *Sigal,* 341 F.2d 837 (3d Cir. 1965); *cf. Brown* v. *United States,* 314 F.2d 293 (9th Cir. 1963). The burden of this petition for certiorari is that this rule is wrong as a matter of policy, that it is antagonistic to the obligation of appellate courts under Rule 52(b), Fed. R. Crim. P., to reverse judgments of conviction that are infected by "plain error," and that it is inconsistent with the principle announced in *Hardy* v. *United States,* 375 U.S. 277. With all respect to the contrary view of several distinguished tribunals, we suggest that it is time that this Court insure that the important procedural guarantee of a complete transcript in criminal proceedings is fully honored. In more detail, our views are as follows:

1. The deficiency in principle in the "no harmless error" rule applied by the lower court in this case is apparent: It rests entirely upon the supposition that, even in a case like this where the trial took five days, trial counsel will recall any errors that occurred during unrecorded portions of the trial. But surely this supposition is not necessarily correct, both because memories are fallible and, perhaps more importantly, because trial counsel might well not have recognized the error when it occurred. Only by review of a full transcript can appellate counsel be certain that no prejudicial error has been overlooked; and only if such a transcript is available can the appellate court discharge its responsi-

bility to notice "plain error" that was not brought to the attention of the court by counsel.

These considerations are analyzed in detail in Judge Biggs' dissenting opinion in *United States* v. *Sigal*, 341 F.2d 837, 846-851 (3d Cir. 1965). As he noted "In order to be able to detect plain error, it is crucial that the counsel representing the appellant have the transcript," for "if counsel did not raise an objection at the trial, the possible error is not impressed in his mind. . . ." Otherwise, "counsel can only allege those errors that he remembers or thinks he remembers as having occurred." Moreover, a federal court "has the duty not to affirm unless it can ascertain from a fair reading of the record that no gross miscarriage of justice will occur," but this is impossible without a full transcript. *Id.*, at 850-851.

In short, the truth of the matter is that, without a full transcript, no one can know whether or not clear and prejudicial error occurred during the trial. Perhaps it did, perhaps not. The common sense of the matter, accordingly, is that a serious violation of the Court Reporters' Act, which is concededly error, is also "prejudicial" error since it disables the defendant from securing a fully informed judicial review. Where a risk of this sort is created by a clear violation of a federal statute, the risk should be imposed upon the Government, not upon the individual, particularly in view of the fact that the Government has a remedy—a new trial—whereas the accused has none.

2. The foregoing analysis is strongly supported by the various opinions in *Hardy* v. *United States*, 375 U.S. 277, as Judge Biggs pointed out in *Sigal*. There this Court rejected the contention that an indigent need be provided only with the transcript pertaining to the particular errors assigned, and held that, at least where new counsel represents the defendant on appeal, the entire transcript must be afforded. The Court reasoned that counsel's "duty may

possibly not be discharged if he is allowed less than that," for "[t]he right [under Rule 52(b)] to notice 'plain errors or defects' is illusory if no transcript is available at least to one whose lawyer on appeal enters the case after the trial is ended." *Id.*, at 280.

Mr. Justice Goldberg, in a concurring opinion joined by the Chief Justice, Mr. Justice Brennan, and Mr. Justice Stewart, noted agreement with the Court's opinion "which is written narrowly," but also expressed the view that complete transcripts should be provided to indigents in all cases whether or not trial counsel continues to serve on the appeal. Mr. Justice Goldberg observed that "[i]t cannot seriously be suggested that a retained and experienced appellate lawyer would limit himself to the portions of the transcript designated by his client or even by the trial attorney, especially where the Courts of Appeals may, and not infrequently do, reverse convictions for 'plain errors' not raised at trial," since "the most basic and fundamental tool of his profession is the complete trial transcript, through which his trained fingers may leaf and his trained eyes may roam in search of an error, a lead to an error, or even a basis upon which to urge a change in an established and hitherto accepted principle of law." In sum, "Anything short of a complete transcript is incompatible with effective appellate advocacy." Moreover, this is so whether or not counsel newly enters the case on appeal, for "No responsible retained lawyer who represents a defendant at trial will rely exclusively on his memory (even as supplemented by trial notes) in composing a list of possible trial errors which delimit his appeal." *Id.*, at pp. 282, 287-288.

Finally, Mr. Justice Clark's concurring opinion accepts the analysis in the Court's opinion:

> ". . . As I see the problem, the Government has not met the burden placed upon it . . . to sustain the frivolity

of the appeal, insofar as plain error is concerned. It appears to me that the Government must furnish the full transcript in order to enable petitioner's new counsel to determine whether plain error occurred during the trial, and likewise to enable the Court of Appeals to pass upon the point." *Id.*, at 297.

To be sure, a transcript could be made available upon remand in *Hardy*, so that the price of reversal was not a new trial. But the point we stress is that the decision below, which rests exclusively upon the notion that the absence of a full transcript is harmless error because appellate counsel did not claim that error occurred during the unrecorded portions of the trial, is wholly inconsistent with the rationale and the opinions in *Hardy*. Nor, we may add, does anything in the case at bar turn upon the distinction between newly retained appellate counsel and appellate counsel who also tried the case. As Mr. Justice Goldberg's opinion indicates, and as Judge Biggs also pointed out in *Sigal*, 241 F.2d, at 850, the same rule should apply in both situations. See also *Holmes* v. *United States*, discussed below at p. 11, note 6. In any event, in the case at bar the petitioners did retain new counsel on appeal.[5]

3. In addition to *Hardy*, other authorities support petitioners' position. Thus, in a recent case in the District of Columbia Circuit, Chief Judge Bazelon and Judge Leventhal emphasized the importance of the *Hardy* opinions to the question whether a complete transcript should be furnished an indigent even though trial counsel is also appel-

[5] As the record discloses, the principal trial counsel was Mr. Ungerman, assisted by Mr. Whitebook. Mr. Jack B. Sellers entered the case after trial and handled the hearing on the motion for new trial as well as the appeal. He was assisted on the appeal, as the briefs reflect and as the records of the Court of Appeals would establish, by Mr. Joe A. Moore, who also was newly retained. Mr. Whitebook, who played a secondary role at the trial, was also on the brief in the Court of Appeals; but Mr. Ungerman, principal trial counsel, was not.

late counsel, both so that the appellant may be adequately represented and so that the appellate court may perform its "obligation to notice plain error whether or not raised. . . ." *Holmes* v. *United States,* No. 20,042 (supplemental opinions released May 11, 1967),[6] pp. 5, 10. And *cf. Poole* v. *United States,* 250 F.2d 396, 398-399 (D.C. Cir. 1957), in which the Court strongly condemned the failure to provide a transcript of sentencing proceedings in every criminal case and declared it "the duty of the District Court to see that henceforth the court reporters comply with the provisions of 28 U.S.C. § 753 . . . in accordance with the unequivocal congressional intent."[7]

Moreover, state court decisions involving analogous court reporter statutes indicate that the correctness of the lower court's ruling respecting section 753(b) is hardly free from doubt. Thus, in Oklahoma the rule is that the failure to comply with the state statute "will be ground for reversal, without regard to the merits" of the trial court's action. *Thompson* v. *State,* 389 P.2d 526 (Okl. Cr. 1964); *Kenton v. State,* 369 P.2d 474, 475 (Okl. Cr. 1962).[8] The same rule

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[6] In this supplemental opinion by the majority in *Holmes,* the Court dealt at length with the deficiencies in the court reporter system that had led in that case to the inability of the appellant to secure review before he had served his sentence. The portions of the opinion relating to the necessity of a full transcript were a response to an opinion of Judge Burger in which he suggested that one of the difficulties was the abuse by appointed counsel of the opportunity to ask for a complete transcript.

[7] The relevant legislative history materials are cited in *Poole* at page 399. Among them, see Senate Report No. 533, 78th Cong., 1st Sess., at page 3 (". . . '[U]nder modern methods of administering justice, it [the reporting of proceedings] is a practical necessity if there is to be an appeal or other review of the proceedings. . . . District Courts of the United States are courts of great power and dignity, they are constantly dealing with matters of gravest consequence, and, under modern conditions, there is no excuse for not having an accurate stenographic record of the proceedings made before them . . .'").

[8] While the Oklahoma statute, 20 O.S. 1961 § 108, was evidently designed to preclude the harmless error rule, the Oklahoma courts, as the *Thompson* opinion indicates, for a time construed the statute in such fashion that the

prevails in Colorado, *Herren* v. *People*, 147 Colo. 442, 363 P.2d 1044 (1961), but *cf. Doe* v. *People*, — Colo. — , 398 P.2d 624 (1965) (*semble*), and in Kentucky, *Woods* v. *Commonwealth*, 305 S.W.2d 935 (Ct. App. 1957).

Finally, we suggest that our position draws support from Mr. Justice Harlan's opinion, concurring in part and dissenting in part, in *In the Matter of Gault*, 35 L. Wk. 4399, 4420-4422 (May 16, 1967), in which he expressed the view that in juvenile court proceedings the provision of a record is "imperative to assure fundamental fairness" because it "would permit the juvenile to assert very much more effectively his rights and defenses, both in the juvenile proceedings and upon direct or collateral review."[9]

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result was the same as under the approach followed by the lower court in the case at bar. Now, however, the Oklahoma courts have adopted a firm rule of reversing whenever the statute is violated.

[9] While this Court has denied certiorari in cases involving violation of section 753, the citations to which are given in note 4, *supra*, all are clearly distinguishable from the case at bar. Thus, in *Burns* the issue was not even raised in the petition for certiorari. *Stirone* and *Dirring* were collateral attack proceedings, so that Judge Biggs concurred in *Stirone* on the ground that a violation of section 753(b) should be raised on direct appeal. In *Addison*, a supplemental hearing was held by the trial judge on the basis of which he found that defense counsel had expressly waived the requirements of section 753(b), as was noted both by the Court of Appeals, 317 F.2d, at 811-812, and by the United States in its Brief in Opposition in this Court (pp. 9, 14 n.9). In *Sigal* there was also a serious question of waiver upon which the United States relied in its Brief in Opposition (p. 5). The United States also represented—over-optimistically, as it developed—that there was "no occasion to review" the *Sigal* decision because "the issue is not likely to recur" (Br. in Opp. pp. 4-5). Moreover, the United States argued that no problem of "plain error" respecting the unrecorded portion of the trial—*voir dire*—could possibly arise, since the defendant had "expressed complete satisfaction with the selection of the jury" and "could not reject on appeal the strategy deliberately and consciously chosen at the trial—that of accepting the jury as constituted. . . ." (*id.*, at pp. 5-6). *Strauss* is most closely in point, but it was decided prior to *Hardy*. Moreover, in response to a perfunctory petition for certiorari, the Government noted that the section 753(b) issue had not been "called to the attention of the trial court either at the time of such occurrences, on the motion for new trial, or in the statement of points on appeal" (Br. in Opp. p. 7). Here, in contrast, unchallenged affidavits established that

4. There are two other determinations by the trial judge that were erroneous but that the Court of Appeals did not decide on the merits. (App. A *infra* pp. 19-20, 21). Accordingly, we do not urge that either constitutes an independent ground for review. Nonetheless, if certiorari is granted we would request the Court to consider these questions. We describe them briefly here.

a. As we have noted, the affidavits submitted to the trial judge by trial counsel—and accepted as true by the Court of Appeals—disclosed that trial counsel were able to recall that at one of the unrecorded bench conferences they made a proffer of testimony by a number of witnesses that petitioner Edwards had a reputation as a "good, law-abiding citizen," and also as "one who is honest, and a man of integrity," but that the trial judge in the course of that conference decided not to admit testimony as to petitioner's reputation for honesty and integrity, but only testimony that he was a "good law-abiding citizen."

Neither the affidavit nor the transcript, however, indicates *why* the trial judge made this perverse ruling. The ruling was plainly incorrect. It is hornbook law that, in a criminal trial, evidence of the defendant's good reputation is always admissible and may itself justify a jury's holding a reasonable doubt as to guilt, provided only that the reputation relates to a trait of character that is relevant to the charge against the defendant.[10] Moreover, it is well established that—as common sense would indicate—traits of honesty and integrity are highly relevant to a charge of fraud.[11] Nor

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trial counsel were unaware the reporter was not recording and the issue was called to the attention of the trial judge on motion for new trial (I R. 125) and was included in the statement of points on appeal (I R. 139).

[10] See generally Wharton's Criminal Evidence (12th ed.), p. 459; I Wigmore On Evidence (3d ed.) 450.

[11] See, *e.g.*, *Keady* v. *United States*, 62 F.2d 689 (10th Cir. 1933); *Edgington* v. *United States*, 164 U.S. 361; *Hamman* v. *State*, 166 Tex. Cr. 349, 314 S.W. 2d 301 (1958); *Griffin* v. *State*, 26 *Ala. App.* 473, 162 So.

did the Court of Appeals hold otherwise; it simply made a guess that the trial judge's ruling was not prejudicial because testimony respecting petitioner Edwards' reputation for not breaking the law—a negative trait considerably narrower than the traits of honesty and integrity, as the Court of Appeals had itself recognized in a prior case [12]—was admitted.

b. The trial judge instructed the jurors that if they had "an abiding conviction of the guilt of the defendants . . . such a conviction as you would be willing to act upon in the more important matters relating to your own affairs, then you have no reasonable doubt as to the guilt of the defendants . . ." (III R. 922). Just such an instruction, in practically those very words, has been disapproved by the Court of Appeals for the District of Columbia Circuit. That Court, relying upon this Court's decision in *Holland* v. *United States,* 348 U.S. 121, 140, has determined that the "reasonable doubt" instruction "should [be] in terms of the kind of doubt that would make a person *hestitate to act* . . . rather than the kind on which he would be *willing to act.*" *Jones* v. *United States,* 338 F.2d 553, 554 (1964).

It is true, on the other hand, that this Court in *Holland,* and the Court of Appeals for the District of Columbia Circuit in cases subsequent to *Jones,*[13] declined to apply the "plain error" rule where exception had not been taken to the instruction at trial, as it was not in the case at bar. Whether such a resolution of the problem by the lower court in the case at bar was correct depends upon facts peculiar

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547 (1935); *State* v. *Ferguson,* 222 Ia. 1148, 270 N.W. 874; *State* v. *Bloom,* 68 Ind. 54 (1879); see generally I Wigmore On Evidence § 59; 32 C.J.S. § 427.

[12] See *Keady* v. *United States,* 62 F.2d 689 (10th Cir. 1933). *Hamman* v. *State* and *Griffin* v. *State, op. cit. supra* note 11, are also squarely in point.

[13] *E.g., Scurry* v. *United States,* 347 F.2d 468 (1965); *McGill* v. *United States,* 348 F.2d 791 (1965).

to this case, such as the closeness of the question of guilt and the adequacy of the other instructions. If certiorari is granted, we will show that, on the basis of such considerations, the "plain error" rule *should* have been invoked.

Conclusion

For the reasons set forth above, this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

SEPTEMBER TERM, 1966

No. 8730

PAUL C. EDWARDS, *Appellant.*

vs.

THE UNITED STATES OF AMERICA, *Appellee.*

No. 8731

EDWARDS ENTERPRISES, INC., *Appellant.*

vs.

THE UNITED STATES OF AMERICA, *Appellee.*

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Joe A. Moore and Jack B. Sellers (Sellers & Woodson and Charles A. Whitebook with them on the brief) for Appellants.

Lawrence A. McSoud, Assistant U. S. Attorney and Hugh V. Schaefer, Assistant U. S. Attorney (John M. Imel, U. S. Attorney with them on the brief) for Appellee.

Before PICKETT and HICKEY, Circuit Judges, and BRATTON, District Judge.

BRATTON, District Judge.

Paul C. Edwards and Edwards Enterprises, Inc. appeal from judgments and sentences pursuant to guilty verdicts on each of ten counts of an indictment. The indictment contained three counts charging violations of the anti-fraud provisions of the Securities Act of 1933, 15 U.S.C. Sec. 77q(a), three counts charging mail fraud, in violation of 18 U.S.C. Sec. 1341, three counts charging use of interstate commerce to sell a non-registered security in violation of

15 U.S.C. Sec. 77e(a)(2), and one count charging transportation in interstate commerce of a security taken by fraud, in violation of 18 U.S.C. Sec. 2314.

The indictment stems from the sale by Edwards of fractional undivided working interests in an oil and gas lease in Oklahoma. All of the counts, other than the three charging the sale of non-registered securities, allege in essence a scheme to defraud those who purchased the fractional undivided working interests and use of the mails in furtherance of the fraud.

Edwards was the president of Edwards Enterprises, Inc. He and his family owned its stock. An oil and gas lease covering lands in Oklahoma was owned by Edwards Enterprises, Inc. Edwards arranged for the sale of 1/32nd undivided working interests in the lease to various investors throughout the United States. As a part of the agreement with the investors, Edwards Enterprises, Inc. acted as the operator on the lease. It was charged that the sales were pursuant to a scheme which embodied the making of numerous misrepresentations and concealment of material facts from the investors about the lease and a well on it and that the mails were used in furtherance of the scheme and fraud.

It was further charged that the offerings of the fractional undivided working interests were securities required to be registered with the Securities and Exchange Commission and that assignments were sent through the mail without a registration statement having been filed with the Commission.

Following a lengthy trial, both defendants were found guilty on each of the ten counts of the indictment. Sentencing and this appeal followed.

Appellant Paul Edwards contends that the trial court unduly restricted the evidence of good character which was tendered on his behalf. In addition, he contends that there was error in failure of the reporter to record the side-bar conference at the bench where this restriction was discussed among counsel and the court.

Numerous side-bar conferences among court and counsel

were not recorded.[1] Failure to comply with the Court Reporters' Act, 28 U.S.C. § 753(b)(1), is not prejudicial error, per se. *Straus* v. *United States,* 5 Cir., 311 F.2d 926, cert. den., 373 U. S. 910, 83 S.Ct. 1297, 10 L.Ed. 2d 411; *Burns* v. *United States,* 5 Cir., 323 F.2d 269, cert. den. 376 U. S. 907, 84 S.Ct. 659, 11 L.Ed. 2d 606; *Stirone* v. *United States,* 3 Cir., 341 F.2d 253; *United States* v. *Taylor,* 4 Cir., 303 F.2d 165; cf., *United States* v. *Sigal,* 3 Cir., 341 F.2d 837.

However, it constitutes error to fail to report any portion of the proceedings in a criminal case where the unavailability of a transcript makes it impossible for the appellate court to determine whether or not prejudicial error was committed. *Parrott* v. *United States,* 10 Cir., 314 F.2d 46; *United States* v. *Sigal,* supra; *Fowler* v. *United States,* 5 Cir., 310 F.2d 66; cf., *Brown* v. *United States,* 9 Cir., 314 F.2d 293.

The only side-bar conference which was not reported to which specific error and prejudice is pointed, occurred during the presentation of the character evidence which appellant, Paul C. Edwards, claims was unduly restricted.

Appellant Edwards presented seven character witnesses. During the examination of the first one inquiry was made as to his knowledge of the general reputation of Edwards as being "a good, law-abiding citizen, one who is honest and a man of integrity." The court sustained objection to that question as being improper. Appellant's counsel then inquired of the witness as to the reputation of Edwards as being a law-abiding citizen following which there was objection and the unreported side-bar conference at the bench.

Edwards' counsel have filed an affidavit by his trial attorneys that at the unreported conference tender was made that each of the witnesses would testify that the reputation of Edwards was that of a good, law-abiding citizen, one who is honest and a man of integrity and that the court limited counsel in his further inquiry to the defendant's

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[1] 28 U.S.C. § 753 provides: "(b) One of the reporters—shall record verbatim—(1) all proceedings in criminal cases had in open court;"

reputation as a law-abiding citizen. While it is admitted that no request was made that the conference be reported, appellants' trial attorneys give the explanation that they did not know it was not being reported.[2]

Subsequent to the side-bar conference, seven character witnesses for the defendant testified without contradiction that the reputation of Edwards as "a good, law-abiding citizen" in Tulsa was good. Accepting as correct appellants' affidavit of the events at the unreported conference, no prejudicial error was committed against Edwards. It is unnecessary to remand for a new trial as in *Parrott* or to remand for the purpose of a hearing on possible prejudice, as in *Brown*.

The character trait as to which evidence is admissible must be relevant to the trait of character which is in issue, and bear analogy and reference to the nature of the charge. *Edgington* v. *United States*, 164 U.S. 361, 17 S.Ct. 72, 41 L.Ed. 467; *Keady* v. *United States*, 10 Cir., 62 F.2d 689; *Hawley* v. *United States*, 10 Cir., 133 F.2d 966; *Travis* v. *United States*, 10 Cir., 247 F.2d 130. Edwards position is that the gravamen of the charges was fraud and the traits of honesty and integrity being directly relevant thereto, it was error to refuse evidence as to his good reputation in those respects.

While the traits of honesty and integrity were relevant and analogous to the nature of the charge, they were included in the all-encompassing question asked each witness as to Edwards' reputation as a good, law-abiding citizen. The question and answers brought to the jury evidence of traits of good character inconsistent with commission of the acts charged against Edwards. The court's instruction correctly defined the purpose for which the evidence of good character was admitted. The testimony of the seven

[2] It is well to note the mandatory requirements of 28 U.S.C. § 753 (b). It is the responsibility of the court to be certain that its provisions are strictly observed, and no request is necessary. The legislative history of the statute makes it clear that the Court Reporters' Act was enacted for the protection of the parties and of the court and to the end that justice may be served by having available an adequate record, and particularly so in a criminal proceeding.

character witnesses was uncontradicted and unchallenged. Under these circumstances, the restriction against amplification of the questions asked the character witnesses did not prejudice Edwards. *Hawley* v. *United States,* supra.

Appellant urges that *Keady* v. *United States,* supra, directs otherwise. In *Keady,* a similar restriction clearly prejudiced the defendant who had one previous conviction and whose admitted occupation was gambling. Some witnesses were not permitted to testify that he was a man of honesty and integrity. The character evidence which was admitted that he was a law-abiding citizen was thoroughly refuted and could have been of little assistance to the defendant. Indeed, the trial judge advised the jury that he could not believe testimony that the defendant was law-abiding in view of his admitted occupation and conviction.

The limitation imposed in *Keady* effectively deprived the defendant of the benefit of evidence of good character or reputation. On the contrary, Edwards had the full benefit of substantial and uncontradicted character evidence broadly relevant to all of the charges against him, which evidence was presented to the jury for its consideration under a proper instruction. He was not prejudiced by the trial court's limitation against amplification.

Appellants contend that several witnesses for the Government committed perjury. The basic thrust of the contention is that certain of the investors who testified committed perjury relative to the amount of money they had invested in the lease, and also as to their relationship with Edwards. This assertion was raised on a motion for new trial and the trial court conducted an evidentiary hearing. At the conclusion the trial judge specifically found that the challenged witnesses did not commit perjury. A review of the extended record reveals no reason for disagreement with that finding.

Appellants assert that a certain letter written to Edwards by one of his employees since deceased should have been admitted under the Business Records Act, 28 U.S.C.A. Sec. 1732 as a record kept in the regular course of business. The letter related to equipment for which Edwards had not made payment upon the grounds that it was defective. Ap-

pellants admit it was written after a dispute had arisen with the supplier of the equipment and was for the purpose of substantiating the claim of Edwards against the supplier. This does not constitute a record made in the regular course of business. *Palmer* v. *Hoffman,* 318 U.S. 109, reh. den. 318 U.S. 800. *Dilley* v. *Chesapeak & Ohio Railway Co.,* 3 Cir., 327 F.2d 249, C.D. 379 U.S. 824, 85 S.Ct. 47, 13 L.Ed.2 34; *Cromling* v. *Pittsburgh and Lake Erie R.R. Co.,* 3 Cir., 327 F. 2d 142; *Otney* v. *United States,* 10 Cir. 340 F.2d 696; *Missouri-Pacific Railroad Co.* v. *Austin,* 5 Cir., 292 F.2d 415.

Appellants object to the instructions of the court defining reasonable doubt and securities exempt from registration under the Securities Exchange Act. Appellants' objection to the court's instruction on reasonable doubt is raised for the first time in this court. No objection was made at trial and no requested instruction in this regard was tendered. There was no plain error in the instruction given and appellants' objection will not now be considered. *Holland* v. *United States,* 348 U.S. 121 (140), 75 S.Ct. 127, 99 L.Ed. 150; *Lopez* v. *United States,* 373 U.S. 427, 83 S.Ct. 1381, 10 L. Ed.2 462; *Burchinal* v. *United States,* 10 Cir., 342 F.2 982; *Walton* v. *United States,* 10 Cir., 334 F.2d 343, Rule 30 Fed. R. Cr. P.; *Lucas* v. *United States,* 10 Cir., 355 F.2d 245.

The objection to the instruction of the court on securities which are exempt from registration with the Securities Exchange Commission as private [3] is that the court should have given illustrations of the determinative factors to be considered rather than merely stating them. Their position is that the instruction without further definition or examples

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[3] The court's instruction in material part was: "The principal factors to be considered in determining whether an offering of securities is public or private are as follows:

(a) The number of prospects and their relationship to each other and to the seller,
(b) The number of units offered,
(c) The size of the offering,
(d) The manner of the offering,
(e) Whether the particular persons affected stand in need of the protection of registration."

was so vague, uncertain and indefinite as to be of no assistance to the jury and was erroneous.

The instruction given was a concise and correct statement of the law. It was not error to refuse amplification to include examples as tendered in the appellants' requested instruction.[4]

There was no reversible error and the judgment is AFFIRMED.

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[4] One example included in the defendants' lengthy requested instruction was:

> "(b) The number of units offered; if only an insubstantial number of units is offered presumably no public offering would be involved. Ordinarily an offering to not more than 25 persons would not be a substantial offering."

The validity of such an instruction would be doubtful. *Securities Exchange Commission* v. *Ralston-Purina Co.*, 346 U.S. 119, 73 S.Ct. 891, 97 L.Ed. 1494; *Woodward* v. *Wright*, 10 Cir., 266 F.2d 108.

APPENDIX B

JUDGMENTS

Fifteenth Day, November Term, Monday, December 5th, 1966.

Before Honorable JOHN C. PICKET and Honorable JOHN J. HICKEY, Circuit Judges, and Honorable HOWARD C. BRATTON, District Judge.

No. 8730

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Oklahoma and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that Paul C. Edwards, appellant, surrender himself to the custody of the United States Marshal for the Northern District of Oklahoma in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

No. 8731

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Oklahoma and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 180

PAUL C. EDWARDS & EDWARDS ENTERPRISES, INC.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners were convicted in the United States District Court for the Northern District of Oklahoma of the sale of unregistered securities, and fraud in the sale of interests in oil and gas leases. The individual petitioner was sentenced to imprisonment for four years and the corporation was fined $1,000. The convictions were affirmed on appeal (Pet. App. A).

The only question that petitioners urge as warranting review by this Court is whether the court re-

porter's failure to record the discussions at bench conferences—most of which concerned the admissibility of evidence (2 Tr. 273, 448, 527, 625; 3 Tr. 645-655, 760, 762)—was illegal *per se* regardless of whether any prejudice to petitioners resulted or was likely.[1]

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[1] Petitioners' trial counsel raised no objection at trial to the failure to record, although they did submit, in connection with a motion for a new trial, an affidavit that they had been unaware that the conversations and rulings at the bench were not being recorded (1 Tr. 125-130). In the court of appeals, petitioner Paul Edwards argued that the failure to record had prejudiced him since at one unreported conference tender was made that each of the character witnesses would testify that Edwards had a reputation of being a good, law-abiding citizen, honest and a man of integrity, but the court limited the inquiry at trial to whether Edwards had a reputation as a good, law-abiding citizen. This limitation was not prejudicial, and in any event presents a distinct issue from whether the bench conference should have been recorded. As the court of appeals noted (Pet. App. A. p. 18), it appears on the record that petitioners' counsel inquired of the first character witness whether he knew the general reputation of Edwards as being "a good, law-abiding citizen, one who is honest and a man of integrity." The court sustained an objection to the question as improper (3 Tr. 830-831) and the bench conference in question ensued. The court of appeals upheld the limitation imposed by the district court, finding that the traits of honesty and integrity were "included in the all-encompassing question asked each witness as to Edwards' reputation as a good, law-abiding citizen" (Pet. App. A. p. 19) and noting that the testimony of the seven character witnesses was uncontradicted and unchallenged. Petitioners do not urge this ruling as a basis for allowing certiorari, although they assert they will challenge it if certiorari is granted (Pet. 13-14).

Petitioners also challenge the district court's instruction on reasonable doubt, asserting that, if certiorari is granted, they will argue that the instruction was plain error requiring

Such contentions have been uniformly rejected. *Strauss* v. *United States*, 311 F. 2d 926 (C.A. 5), certiorari denied, 373 U.S. 910; *Addison* v. *United States*, 317 F. 2d 808 (C.A. 5), certiorari denied, 376 U.S. 905; *Stirone* v. *United States*, 341 F. 2d 253 (C.A. 3), certiorari denied, 381 U.S. 902; *Burns* v. *United States*, 323 F. 2d 269 (C.A. 5), certiorari denied, 376 U.S. 907. The failure to record a bench conference, which normally is merely a preliminary step to a ruling reflected in the record, cannot be likened to the complete absence of a transcript. Some prejudice, or danger thereof, must be shown; and no such showing was made here.

It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

JUNE 1967.

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reversal despite the absence of objection (Pet. 14-15). As petitioners admit, however (Pet. 14), a similar instruction was held not to be plain error in *Holland* v. *United States*, 348 U.S. 121, 140.

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